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No. 82-842

IN THE SUPREME COURT OF THE UNITED STATES

JAMES D. RAY, PETITIONER

v.

THE TENNESSEE VALLEY AUTHORITY, ET AL.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

# PETITION FOR CERTIORARI

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## QUESTIONS PRESENTED

(1) Does Tennessee Valley Authority's (TVA's) "sue and be sued" clause in charter and exemption from Tort Claims Act's defamasuit exemption require less stringent standards than the "stigma plus" of Paul v. Davis in a defamation action so that Kiefer & Kiefer v. RFC standards still apply to TVA?

(2) Is violation of an employment contract with TVA a separate cause of action from a Federal Equal Employment Opportunity complaint? If so, does TVA's "sue and be sued" clause allow Federal Court jurisdiction?

(3) Does District Court's finding that Civil Service Commission's (CSC'S) finding that reduction-in-force (RIF) of Veterans' Preference Eligible was proper allow rejection of jurisdiction of violations of reemployment rights that occurred after the CSC's decision? If not, do the McKart exhaustion of administrative remedies requirements, Brown v. GSA, and CSC regulation (just diligence) preclude a one year statute of limitations of reemployment

right violations?

(4) Does uniformity in federal policy require that federal court have equitable jurisdiction over a malpractice claim against attorney appointed under Equal Employment Opportunity Act of 1972 in a Federal employment case?

(5) Is 1974 decision of district court void for lack of due process of law, and, or limited to those things actually tried that were limited by Brown v. GSA to those claims in the administrative record?

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PETITION FOR CERTIORARI

## OPINIONS BELOW

The final order granting the Tennessee Valley Authority's Motion For Summary Judgment and Memorandum Opinion of the District Court, both entered on Feb. 17, 1981; and the decision of the 11th Circuit of June 4, 1982, rehearing denied August 3, 1982, which is reported at 677 F.2d 818 (11th Cir. 1982) appear in the appendix (A-32-39 and A-1-31 respectively).

The motion to dismiss of Jack Drake was granted without opinion.

## JURISDICTION

The Judgment of the Court of Appeals for the 11th Circuit was made and entered on June 4, 1982, and a petition for rehearing and suggestion for rehearing en banc was denied on August 3, 1982, and a copy of the judgment is appended to this petition in the Appendix. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are entirely ones involving the district court's jurisdiction over three interrelated claims: (a) An allegation that a TVA budget officer's statement with reference to petitioner's reduction-in-force (RIF) in 1973 that "Hell, they fired Jim Ray -- he is the only one at the management level I can think of that they ever fired in the OACD." constituted slander per se or else was evidence that the 1973 RIF was fraudulent. (b) An allegation that the attorney appointed by the district court to represent petitioner in his 1974 Equal Employment Opportunity Act (EEO Act) of 1972 complaint was guilty of malpractice in withdrawing without doing a single thing in aid of the plaintiff. This, combined with the fact that the court subsequently granted summary judgment for defendant TVA's board of directors without notice that another attorney would not be appointed and without the 10 day notice

requirement that the motion to dismiss would be converted to summary judgment was urged by petitioner to show that the court's 1974 summary judgment (that was not accompanied by an entry of a final judgment on a separate document) was void for lack of due process of law. (c) Petitioner, who is a Veterans' Preference Eligible alleged violation of his employment contract with TVA which ran from January to January on an annual basis, while his employment was terminated on March 30, 1973. Petitioner pursued all of the administrative remedies that were offered to him and finally, in the instant action has pursued his contract rights. In a highly convoluted fashion, the district court has mixed this up with the EEO Act of 1972 claims, his Veterans' Preference Eligible rights to reemployment (which the S.Ct. has held are an integral part of the due process rights involved in a RIF) and held that the 1974 summary judgment was res judicata to the instant claim. The court of appeals affir-

med summary judgment for TVA and Briglia, the budget officer, as well as dismissal of the malpractice claim.

The questions presented for review are:

(1) Does Tennessee Valley Authority's (TVA) "sue and be sued" clause in charter and exemption from Tort Claims Act's defamation suit exemption require less stringent standards than the "stigma plus" of Paul v. Davis in a defamation action so that Kiefer & Kiefer v. RFC standards still apply to TVA?

(2) Is violation of an employment contract with TVA a separate cause of action from a Federal Equal Employment Opportunity complaint? If so, doew TVA's "sue and be sued" clause allow Federal Court jurisdiction?

(3) Does District Court's finding that Civil Service Commission's (CSC's) finding that reduction-in-force (RIF) of Veterans' Preference Eligible was proper allow rejection of jurisdiction of violations of reemployment rights that occurred after the CSC's decision?

If not, do the McKart exhaustion of administrative remedies requirements, Brown v. GSA, and CSC regulation (just diligence) preclude a one year statute of limitations of reemployment right violations?

(4) Does uniformity in federal policy require that federal court have equitable jurisdiction over a malpractice claim against attorney appointed under Equal Employment Opportunity Act of 1972 in a Federal employment case?

(5) Is 1974 decision of district court void for lack of due process of law, and, or limited to those things actually tried that were limited by Brown v. GSA to those claims in the administrative record?

## STATEMENT OF THE CASE

### Jurisdiction of District Court

Jurisdiction of the District Court is based on the claims being ancillary, pendant and supplementary to those in Ray v. Tennessee Valley Authority, CA 74-G-601-NW, filed June

20, 1974; 28 U.S.C. §§§1331, 1337, 1342; 42 U.S.C. §§§2000e-5(f)(1)-(3), 2000e-11, 2000e-16(c); deprivation of liberty and property rights under the 5th Amendment of the Constitution; and the right to be free from defamatory statements which are not tolerated under the freedom of speech clause of the 1st Amendment of the Constitution; and to seek damages in suing the Tennessee Valley Authority for violation of contract and for defamation under 16 U.S.C.§831(c)(b) which, since the TVA is exempted from the "ort Claims Act by 5 U.S.C. §2680 (1)(the letter "ell") confers jurisdiction on the district court over petitioners claims under the State of Alabama laws of defamation, and unlawful trade practices, Code of Alabama §§§§6-2-34, 6-5-180, 6-5-182, 6-5-183, Code of Alabama, 1975§§§8-10-3, 8-19-5, 8-19-6, Code of Alabama, 1975 §13A-11-163, Code of Alabama, 1975 §25-7-9 and the Alabama Constitution of 1901, Art. 1, Sec. 13, the analogue of the Federal Constitution's 5th

Amendment, but which exceeds the 5th Amendment in also proscribing injury to one's reputation without due process of law.

Jurisdiction over Attorney Jack Drake is based on the malpractice claim being ancillary, pendant and supplementary to the EEO Act of 1972 under which he was appointed as authorized in 42 U.S.C.§2000e-5(f)(1) and that public policy requires a nationwide uniformity of standards of practice by attorneys so appointed, so that the Court's inherent powers require that Alabama Code of 1958 §7-21; Alabama Code, 1975 §6-2-34(4) and (8) governing the 6-year limitations period for malpractice claims be tried in a federal court with that limitations period.

## Course of Proceedings Below

Petitioner Ray in 1973 was terminated from his employment with TVA by what was stated to be a reduction-in-force (RIF which was subject to the regulations of the former Civil Service Commission under the Veterans' Preference Act

of 1944. The limited scope of review of that action is listed in the Federal Personnel Manual, Chap 351, Appendix D-2 (A-48-49) The actual issues considered by the Civil Service Commission in the decision of the Board of Appeals and Review (A-43-45) did not include questioning the TVA's reason for the RIF, i.e., whether TVA's stated "budget reasons" (R.Exc. p. 45 lines 3-6) was true, whether Ray's employment contract was violated, (Congress had approved the budget of TVA that included Ray's salary through June of 1973), or address violations of Ray's reemployment rights. The subsequent complaint in the district court and the associated claim of discrimination in employment based on Ray's religious beliefs, Ray v. Tennessee Valley Authority, CA 74-G-601-NW, June 20, 1974 (A40-42) preceeded the Supreme Court's decision in Chandler v. Roudebush, 96 S.Ct. 1914 (1976) that a trial de novo is required in EEO cases, and thus the case was disposed of without an adverserial trial, but

only on review of the administrative record. No judgment on a separate document was made. There was no representation by counsel -- the court had appointed Mr. Jack Drake of Tuscaloosa, Ala. to represent Ray, but Mr. Drake petitioned the court to withdraw and was allowed to do so. Then without giving any notice that another attorney would not be appointed, as the district court's Order (A-40-42) shows was the plan, the court granted summary judgment to TVA defendants. An appeal was dismissed as untimely, Ray v. Tennessee Valley Authority, 521 F.2d 812 (5th Cir. 1975), cert. denied, 424 U.S. 973 (1976).

Ray's attempt to intervene in the race discrimination suit against TVA, Eastland v. Freeman, No. 73-G-487-NW (N.D.Ala., filed May 21, 1973) was denied on the basis of res judicata, and affirmed in Eastland v. Tennessee Valley Authority, 638 F.2d 1232 (5th Cir. 1981).

Since State of Alabama statutes of limita-

tions on Contract violations and actions against attorneys-at-law for neglect or ommission of duty, Code of Alabama, 1975 §6-2-34(4),(8) (A-49) were running out as well as Alabama's 1 year statute for actions charging defamation, the instant action was commenced.

In October, 1979, Mr. Arnold E. Briglia, the Budget Officer of the Office of Agricultural and Chemical Development (OACD) of the Tennessee Valley Authority stated in the presence of a number of professional chemists (Ray has a PhD in Chemistry from Stanford University) "Hell, they fired Jim Ray -- he is the only one at the management level I can think of that they ever fired in the OACD." That statement of the budget officer (who would better know whether Ray's 1973 RIF was because of "budget reasons") was made with reference to petitioner's RIF by TVA's OACD in 1973, and contradicts TVA's stated "budget reason," or alternatively, if untrue, was a defamatory statement under the

Alabama Constitution of 1901, Art. 1, Sec. 13 and statutes promulgated thereunder. (A-49, et seq.) Ray maintained that since 5 U.S.C. §7512 (A-46, 47) proscribes taking such an "adverse action" against a Veterans' Preference Eligible:

> ...except when there is reasonable cause to believe him guilty of a crime for which a sentence of imprisonment can be imposed...

that Code of Alabama, 1975 §6-5-180 (A-49,50):

> every accusation importing the commission of a crime punishable by indictment must be held presumptively to mean what the language used ordinarily imports.

and Alabama's alternate criminal offense §13A-11-163 are the basis in law for a defamation charge.

Ray in his instant action also alleged that his reemployment rights as a Veterans' Preference Eligible had been totally ignored by TVA. In his reply brief,(R.Exc. p. 40-41) Ray points out the continuing discriminatory systematic nature of this practice.

Three further EEO complaints have been

pursued through TVA and the Equal Employment Opportunity Commission regarding violations of petitioners reemployment rights. These complaints were filed at the times that petitioner first learned of the violations. One of these is the subject of a current complaint in the district court, Ray v. Charles H. Dean, et al., CV82C5239NW, N.D.Ala. filed Apr. 29, 1982).

The district court dismissed Ray's complaint of malpractice against Mr. Drake on Dec. 18, 1980 (R. Exc. p. 22) without opinion. On Feb. 13, 1981 the district court granted summary judgment for defendants TVA, et al. (A32-33) The district court's Memorandum Opinion (A34-39) held that its 1974 opinion rendered res judicata the instant claims of violation of employment contract. The court ignored claims that the 1974 judgment was void. The claim of reemployment rights violations was disposed of by ruling that a one year statute of limitations applied and that these

rights expired in March 1975. The defamation claim was ruled against on the basis that the S.Ct. decision in Paul v. Davis, 424 U.S. 693 (1976) was not based on a constitutional claim, but rather was "a creature of the state's tort law," and since no subject matter jurisdiction existed, the "slander action" must be dismissed for lack of subject matter jurisdiction.

The decision of the district court was affirmed in Ray v. Tennessee Valley Authority, 677 F.2d 818 (1982); rehearing and rehearing en banc denied August 3, 1982 (A-1-31).

The district court ignored the claim of right to collaterally attack its 1974 judgment as being void for lack of due process of law. That claim is made in Count three (R.Exc. p.8) of the Complaint. The more detailed statement of the reasons the district court's 1974 judgment was void for preventing access to due process of law in the taking of liberty and property were before the district court in petitioner's Motion to Intervene in Eastland

v. S. David Freeman, et al CA 73-487 NW, Motion denied May 6, 1980, on appeal 5th Cir. No. 80-7553, Petition denied Feb. 2, 1981, rehearing denied Feb. 2, 1981, at the time of the instant suit. The claim was before the 11th Circuit in the instant case in the supplement to the record on appeal, Brief for Intervenor-Appellant in Eastland v. Freeman, No. 80-7553 (supra) pp 19 thru 21.

PARTIES

Respondents named in the caption on the case are the Tennessee Valley Authority (hereinafter (TVA) as required by TVA's "sue-and-be-sued" clause; S. David Freeman, former chairman of TVA's board of directors, Richard M. Freeman, member of TVA's board of directors, Robert N. Clement, former member of TVA's board of directors, and Arnold T. Briglia, budget officer of TVA's Office of Agricultural and Chemical Development where petitioner was formerly employed. These four individuals are named in both eheir individual and offic-

ial capacities. Also appearing on the Complaint (R.Exc.3) is Jack Drake, the attorney who was appointed under the Equal Employment Opportunity Act of 1972 to represent petitioner in 1974.

## ARGUMENT

### (1) "Stigma-plus" of Paul v. Davis Inapplicable under TVA's "sue and be sued" clause.

The district court's ruling that it lacked jurisdiction over petitioner's defamation claim was based on the assumption that the TVA could not be sued for a state defined tort claim, and that the evidentiary standards of Paul v. Davis, 424 U.S. 645, 96 S.Ct. 1155, 47 L.Ed. 2d 366 (1976) were not met.

16 U.S.C. 831c of the Tennessee Valley Authority Act of 1933 (A-47):

> Except as otherwise specifically provided in this chapter, the Corporation--
> (b) May sue and be sued in its corporate name.

has no restriction as to suit in any court, State or Federal except with respect to condemnation proceedings which are limited to the

United States district courts, 16 U.S.C. §831x (A-47). Since the TVA is excepted from the provisions of the Tort Claims Act of 1946 with respect to its exception of claims arising out of libel, slander or interference with contract rights, etc., then the TVA is still subject to the standards of Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784 (1939) in contrast to the other "sue and be sued" federal corporations that are subject to the Tort Claims Act's exceptions. The TVA is responsible for the defamation by its agent Mr. Briglia under Cooper v. Alabama Farm Bureau Mutual Casualty Insurance Company, Inc., 385 So.2d 630 (Ala. S.Ct. June 6, 1980).

This Court has accepted for review the petition of Bush v. Lucas, No. 81-469. The non-exemption of the National Aeronautics and Space Administration in contrast to TVA's exemption from the Tort Claims Act of 1946 points to the desirability that these two

cases be distinguished.

(2) Employment Contract Violation Separate Cause of Action from Federal EEO Complaint? McKart Tolling?

The Court of Appeals has affirmed the district court's ruling that petitioner could not pursue his employment contract violation cause of action separately from his "mixed case" EEO-RIF complaint of 1973 (agency level) and 1974 (district court level). This court in Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 1019 n.9, 39 L.Ed.2d 147 (1974) observed:

> "...The report of the Senate Committee responsible for the 1972 Act explained that the "provisions regarding the individual's right to sue under title VII, nor any of the other provisions of this bill, are meant to affect existing rights granted under other laws." S.Rep.No. 92-415, p. 24 (1971).

Relying on that decision, Aleem v. General Felt Industries, 27 FEP Cases 569, 570 (9th Cir. 1981) held that EEO and arbitration complaints could be pursued at different times:

Nor is there any requirement that

Aleem join the two independent claims in one action, even if he could.

Cener v. Marathon Oil Co. 583 F.2d 830 (6th Cir. 1978) held that separate claims under contract and the Age Discrimination in Employment Act could be brought in one suit if grounded on the same nucleus of common operative facts.

The question as to whether in an individual employment contract violation associated with a federal EEO case, the two causes of action may be split into separate lawsuits was not addressed in Alexander (supra), in which a labor union contract was involved, (although the Senate report quoted therein speaks of the individual's rights) and should be settled by this court.

The decision of the Civil Service Commission's Board of Appeals and Review in Ray's 1973 Veterans' Preference appeal (A-43, 3rd par.) did not consider the employment contract question, and under the regulation in the Federal Personnel Manual, Ch. 351, Appendix D-2

(A-48-49) which that decision construed, it could not have.

The district court appears to have misconstrued Commissioner v. Sunnen, 333 U.S. 591, 599-600, 68 S.Ct. 715, 719-720, 92 L.Ed. 898 (1948):

> ...if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case.

The relevant fact in the violation of employment contract claim is that Congress had approved TVA's budget which included Ray's salary through June 30, 1973, and in terminating his employment in March, his January to January employment contract was violated. Since this fact could not be considered by the Civil Service Commission, the claim should not have been dismissed under res judicata doctrine, particularly since the district court proceeding only involved a review of the administrative record.

(3) Whether Veteran's Reemployment Rights Violations were Subject to One Year Statute of Limitations

This Court in Brannan v. Elder, 341 U.S. 27, 71 S.Ct. 685, held that retention-preference (in RIFs) regulations are under §12 while reemployment preferences are under §15 of the Veterans' Preference Act (Prior to the Civil Service Reform Act of 1978 which is not applicable in the instant case, these sections were 5 U.S.C. §§3502 and 3315 respectively) and treated the claims as separate causes of action. After first affirming the Civil Service Commission's finding that Elder's RIF was properly carried out, this Court went on to consider the reemployment rights violation claims. It was held in Rasmussen v. United States, 543 F.2d 134 (Ct.Cl., 1976) (R.Exc. p. 41, and 11th Cir. oral argument):

> ...we have determined that the Board violated a procedural regulation to the plaintiff's detriment. The major procedural lapse vitiated the Board's decision. This in turn invalidated the plaintiff's reduction-in-force since his reassignment rights were an integral part of that

> reduction. The same notice which told him that his position was to be abolished also informed him of * * * rights* * * under Civil Service regulations; and those regulations imposed on the agency specified assignment and "bumping" steps --as well as the procedural steps the employee could take to vindicate his rights. These assignment rights were as important as, perhaps more important than, the validity of the abolishment of the GS-13 job itself. Thus, the failure to accord plaintiff a significant procedural right means that the reduction-in-force cannot be enforced. Cf. 458 F.2d 39, 136 F. Supp. 748.

In Ray's case, the RIF notice (R.Exc. pp-14-15) contained the statement:

> For 2 years after termination you will be given preference for appointment to positions for which you are eligible and request to be placed on the reemployment list.

Ray's case is distinguished from Brannan (supra) in that Ray did ask to have his name placed on the reemployment list (R.Exc. pp 34 and 41) and so met the Brannan v. Elder requirement. But, the district court has denied Ray the right to a hearing on his reemployment rights that Elder was given by the S.Ct. Even worse, the district court has turned Rasmussen (supra) upside down! There, the violation of post RIF rights

such as the reemployment rights in the instant case rendered the RIF itself invalid; but here a finding that the RIF was valid has ruled out pursuit of subsequently discovered reemployment rights violations!

The 11th Circuit affirmation is thus in conflict with decisions of this Court as well as of the Court of Claims, and the issues should be settled by this court.

The one year limitations period invoked by the district court in disposing of petitioner's reemployment right basis for employment contract violation was based on Buckner v. Goodyear Tire & Rubber Co., 339 F.Supp. 1108, 1117-8 (N.D.Ala. 1972) adopted and aff'd, 476 F.2d 1287 (5th Cir. 1973) which found a 1 year limitations period in a 42 U.S.C.§1981 case which did not involve contract rights. Buckner (supra) relied on Sewell v. Grand Lodge of Intern'l Ass'n of Machinists, 445 F.2d 545 F. 2d 545 (5th Cir. 1971) in concluding that the federal law relied on, the Labor Management

Reporting and Disclosure Act of 1959, involved a breach of duty rather than contract. Watkins v. Scott Paper Co. 530 F.2d 1159 (5th Cir. 1976) held:

> Where a statute sets the amount of compensation due an employee, the statute may be read into the employment contract, and a suit for back wages is based upon contract. ···This would be the case under the Fair Labor Standards Act, ··· Title VII provides for back pay, but does not prescribe what that pay shall be. Therefore, Title VII is not to be understood as "implied" in the plaintiffs' employment contracts. The employees' right to back pay arises out of the duty not to discriminate imposed by Title VII, not out of a contract.

In Ray's employment contract (R.Exc. p 11-12), it is the Back Pay Act of 1966, 5 U.S.C §5596 that must be read into the employment contract, since that Act does specify the amount of back pay:

> (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or

differentials of the employee--

(A) is entitled to correction of the personnel action, to receive for the period for which the personnel action was in effect--

(1) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period;

Congress gave the Civil Service Commission the power to enforce a Veterans' Preference Eligible's reemployment rights through 5 U.S.C. §1302(c) (A-46). No limitations but rather only diligence was required as promulgated in 5 C.F.R. §330.203 (which applies here under the grandfather clause of the Civil Service Reform Act of 1978). It is undisputed that Ray has active appeals before the Equal Employment Opportunity Commission involving violations of his reemployment rights, and that these require application of the equitable "tolling" doctrine.

For these reasons, this Court should settle the question as to whether a Veteran's

reemployment rights are ex contractu or ex delicto.

(4) Malpractice Claim Against EEO Appointed Attorney

The district court rejected jurisdiction over the "malpractice" claim and the court of appeals affirmed.

There are varying cannons of ethics of the State Bar Associations, and varying standards of enforcement thereof. In contrast, the EEO Act of 1972 established a uniform national policy proscribing discrimination in employment. To the extent that an allegation of such discrimination is necessarily pursued by the aid of an attorney appointed under 42 U.S.C.§2000e-5(f)(1) and because of the limited venue imposed by that Act, such uniformity might not follow.

In using the word appoint, the same word that is used in the Criminal Justice Act, rather than "the court may request an attorney" of 28 U.S.C.§1915 applicable to other civil

actions, Congress indicated the seriousness of the Attorney's duty as being equal to that under the 6th Amendment of the Constitution. To require a plaintiff to pursue a separate lawsuit in State court to enforce his rights to due process in an EEO case (with respect to a "malpractice" claim against the appointed attorney appears at variance with the description of congressional intent in Hackley v. Roudebush, 520 F.2d 108, 148 (DC Cir. 1975):

> the right to plenary judicial proceedings was provided to insure that the trumpet did not sound a hollow note. (emphasis supplied)

Beyond the question as to whether the district court had jurisdiction over attorney Jack Drake because of his appointment under the EEO Act of 1972 which the 11th Circuit decided against petitioner, the district court also declined any action allowed under its inherent powers. That rejection is in conflict with decisions of this Court. An attorney appearing before a court is its off-

icer. Cohen v. Hurley 366 U.S. 117, 124, 81 S.Ct. 954, 6 L.Ed.2d 156, 162 (1961). Such an attorney is "...subject to continuing scrutiny by ...the courts. ..." In re Griffiths, 413 U.S. 717, 727, 93 S.Ct. 2851, 2857, 37 L.Ed.2d 910, 918 (1973). The Court possesses "...autonomous control over (his) conduct...." Theard v. United States, 354 U.S. 278, 281, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342, 1344 (1957). Ex parte Wall, 107 U.S. 265, 2 S.Ct. 569, 581, 27 L.Ed. 552 (1883) quoted Re Hill, L.R.3Q.B.543:

> I think when we are called upon, in the exercise of our equitable jurisdiction, to order an attorney to perform a contract to pay money, or to fulfill an undertaking, that we have jurisdiction only if the undertaking or the contract is made in his character of attorney, or is so connected with his character of attorney as to bring it within the power of the court to require that their officer shall behave well as an officer.

In re Hill quoted in ex parte Wall (supra) was regarding equitable jurisdiction. The Constitution does not require Congress to confer equity jurisdiction on any particular inferior court. Lockerty v. Phillips, 319 U.S. 182, 63 S.Ct.

1019, 87 L.Ed. 1339 (1943).

At the very least, the court could find jurisdiction under 28 U.S.C §1927 which under the 1980 amendment includes "all persons" in the award of attorney's fees for vexatiously increasing the litigation.

This court should settle the question of jurisdiction over attorneys appointed under the EEO Act of 1972.

(5) Is the 1974 Decision of the District Court Void for lack of Due Process of Law?

The district court's 1974 judgment (A-40-42) is void for lack of due process of law since no final judgment on a separate document was entered. Ray, a pro-se plaintiff without legal training was thus case in precisely the role that Bankers Trust Co. v. Mallis, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) describes, with the result that his appeal was dismissed as untimely.

Since no notice was given that another attorney would not be appointed after the

withdrawal of Mr. Jack Drake, (this was admitted by Mr. Drake at the 11th Circuit oral argument), then the court had no jurisdiction in any case to proceed to judgment. Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897).

The withdrawal of Mr. Jack Drake as appointed attorney without his having done a single thing in aid of Ray's cause denied Ray due process of law.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

JAMES D. RAY, PRO SE
PETITIONER

677 F2d 818 (1982)

James D. Ray, Plaintiff-Appellant,

v.

The TENNESSEE VALLEY AUTHORITY,

et al., Defendants-Appellees.

No. 81-7339.

United States Court of Appeals,

Eleventh Circuit.

June 4, 1982.

Petition for Rehearing and Suggestion for Rehearing en banc Denied August 3, 1982

Former TVA research chemist, whose employment was terminated in 1973 by reduction-in-force action, brought suit against his former attorney for malpractice and against TVA alleging, inter alia, that his termination breached his contract of employment and violated his reemployment rights under the Veteran's Preference Act The United States District Court for the Northern District of Alabama, J. Foy Guin, Jr., J., dismissed the malpractice claim and granted summary judg-

ment to TVA on the federal claims and dismissed chemist's pendent state claim for defamation, and chemist appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) breach of contract claim brought against Tennessee Valley Authority by former TVA research chemist, who filed suit against TVA in federal court in 1974 seeking review of a decision of the Civil Service Commission which upheld his dismissal, was barred by res judicata; (2) claim for violation of employment rights under Veteran's Preference Act was barred by res judicata and (3) trial court lacked jurisdiction over legal malpractice claim where both parties were citizens of Alabama and where malpractice claim did not present a federal question.

Affirmed.

1. Judgment key 560

Under doctrine of res judicata, a final judgment on merits bars further claims by the parties based on the same cause of action.

2. Judgment key 540

For a prior judgment to bar a subsequent action under doctrine of res judicata, it is firmly established that the prior judgment must have been rendered by a court of competent jurisdiction, that there must have been a final judgment on the merits, that the parties, or those in privity with them, must be identical in both suits and that the same cause of action must be involved in both suits.

3. Judgment key 585( 2), 589( 1)

Principal test for determining whether causes of action are the same for purposes of res judicata is whether primary right and duty or wrong are the same in each case; furthermore, substance of the action, not the form, controls.

4. Judgment key 585(2)

Breach of contract claim brought against Tennessee Valley Authority by former TVA research chemist, whose employment was terminated in 1973 by reduction-in-force action and

who filed suit against TVA in federal court in 1974 seeking review of a decision of the Civil Service Commission which upheld his dismissal, was barred by res judicata.

5. Judgment key 713(2), 720

Res judicata bars subsequent litigation not only in respect to every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented.

6. Armed Services key 122(1)
Judgment key 713(2)

Former TVA research chemist's claim that TVA violated his reemployment rights under Veteran's Preference Act in dismissing him in 1973, which should have been brought as an alternative theory for recovery in his previous suit seeking review of decision of Civil Service Commission which upheld his dismissal, was barred by res judicata; furthermore, even if claim was not subject to the bar of res judicata, it was untimely under Alabama's one-

year limitations period for actions for injury to the person or rights of another not arising from contract. 5 U.S.C.A. §2108; Ala.Code 1975, 6-2-39(a)(5).

7. Federal Courts key 424

When a federal statute granting a cause of action fails to include a limitations period, a federal court should look to the state statute of limitations governing the state action most closely analogous to the federal action; however, if state limitations period is so short as to interfere with federal policies, it will not be applied to the federal action.

8. Civil Rights key 13.4(1)

Alleged slander of former TVA research chemist, whose employment was terminated by reduction-in-force action, by a TVA budget officer, who stated six years later that the TVA had "fired" research chemist and that he had been the only management-level employee

ever "fired" by the agency, did not "occur in connection with" the asserted deprivation of employment nor was it "reasonably related to" that deprivation and therefore did not give rise to a federal cause of action.

9. Federal Courts key 14

Pendent jurisdiction encompasses two elements: first, for federal court to have power to hear the state claims, court must have jurisdiction over substantial federal claim and the federal and state claims must arise from the common nucleus of operative fact and even when the power to hear the claim exists, decision to exercise that power is discretionary with trial judge.

10. Federal Courts key 18

Even assuming trial court had power to hear former TVA research chemist's pendent claim against his former employers, court's refusal to exercise its discretion was not an abuse of discretion where the only federal claims which chemist asserted against TVA were

breach of contract and reemployment rights violations claims against TVA, which trial court correctly decided in favor of the agency on summary judgment.

11. Federal Courts key 192

Trial court lacked jurisdiction over legal malpractice claim where both parties were citizens of Alabama and where malpractice claim did not present a federal question. 28 U.S.C.A. § 1332.

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James D. Ray, pro se.

Larry W. Harper, William T. Mills, Birmingham, Ala., Herbert S. Sanger, Jr., Justin M. Schwamm, Sr., Thomas F. Fine, David W. Miller, Tennessee Valley Authority, Knoxville, Tenn., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before RONEY and KRAVITCH, Circuit Judges, and PITTMAN*, District Judge.

*The Honorable Virgil Pittman, U.S. District

KRAVITCH, Circuit Judge:

James D. Ray appeals from the district court's grant of summary judgment on his claims against the Tennessee Valley Authority and his former attorney, Jack Drake. On appeal Ray argues that the district court erred in dismissing his breach of contract claim against TVA on the basis of res judicata; that his claim based on the violation of his Veteran's reemployment rights is not barred by the statute of limitations; that his claim of defamation by a TVA employee states a proper federal cause of action; and that the court's dismissal of his malpractice action against his court-appointed attorney Jack Drake for lack of subject matter jurisdiction was improper. For the reasons stated below, we affirm.

## I. Background

Appellant Ray was formerly a research

Judge for the Southern District of Alabama, sitting by designation.

chemist for TVA. In 1973, appellant's employment with the TVA was terminated by a reduction-in-force action (RIF). Ray appealed his dismissal to the Civil Service Commission, which decided against him, then filed suit against the TVA in federal court on June 20, 1974. In this action Ray sued for review of the Civil Service Commission decision and also alleged that the RIF violated his civil rights under 42 U.S.C. §§1983, 1985. The substance of Ray's complaint was that the RIF was a sham and that he had been improperly terminated by the TVA.[1] The district court ruled against Ray on defendants' motion for summary judgment. Ray appealed, and his appeal was dismissed by the former Fifth Circuit as untimely.[2]

1. Specifically, Ray alleged that he was terminated because of a difference in religious beliefs from his supervisor at TVA.

2. Ray v. Tennessee Valley Authority, 521 F.2d 812 (5th Cir. 1975), cert. denied, 424 U.S. 973 (1976). Although the appeal was dismissed as untimely, the court stated that it had reviewed the merits of the case and found no error.

In 1980, Tay attempted to relitigate his claims by intervening in a race discrimination suit against the TVA.[3] The district court denied intervention on the basis of res judicata, and the Fifth Circuit affirmed.[4]

This appeal results from Ray's third venture into the federal courts for redress of his grievances against the TVA. Ray's complaint contained three counts. Count I alleged that his termination by the 1973 RIF was improper and breached his contract of employment with TVA. Ray also asserted in this count that TVA had violated his reemployment rights under the Veteran's Preference Act, ch. 287, 58 Stat. 387 (1944). In count II Ray asserted that he had been defamed by a TVA employee, and count III alleged malpractice against Jack Drake, the attorney appointed by the court to assist

3. Eastland v. Freeman, No. 73-G-487-NW (N.D.Ala., filed May 21, 1973).

4. Eastland v. Tennessee Valley Authority, 638 F.2d 1232 (5th Cir. 1981).

Ray in his original 1974 lawsuit. Drake moved to dismiss count III for failure to state a claim on which relief could be granted and lack of subject matter jurisdiction. The motion was granted by the trial court. TVA then moved for summary judgment on counts I and II. The court held that count I was barred by res judicata and the statute of limitations, and that count II was a pendent state claim which lacked a jurisdictional base once count I was dismissed. Accordingly, the court granted TVA's motion for summary judgment.

II. The Breach of Contract Claim

[1, 2] Res judicata ensures the finality of decision; under the doctrine, a final judgment on the merits bars further claims by the parties based on the same cause of action. Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979); Blair v. City of Greenville, 649 F.2d 365, 368 (5th Cir. 1981).

For a prior judgment to bar a subsequent

> action, it is firmly established (1) that the prior judgment must have been rendered by a court of competent jurisdiction; (2) that there must have been a final judgment on the merits; (3) that the parties, or those in privity with them, must be identical in both suits; and (4) that the same cause of action must be involved in both suits.

Stevenson v. International Paper Co., 516 F.2d 103, 108 (5th C ir. 1975). The first three elements of this test unquestionably are met in this case. A final judgment was rendered by a court of competent jurisdiction in Ray's 1974 lawsuit against the TVA. Thus in determining whether res judicata bars Ray's "breach of contract" claims the key issue is whether the claim constitutes the same "cause of action" as in his original 1974 lawsuit.

[3] The principal test for determining whether the causes of action are the same is whether the primary right and duty or wrong are the same in each case. White v. World Finance of Meridian, Inc., 653 F.2d 147, 150 (5th Cir. 1981); Commercial Box & Lumber Co., Inc. v. Uniroyal, Inc., 623 F.2d 371, 374

(5th Cir. 1980); Kemp v. Birmingham News Co., 608 F.2d 1049, 1052 (5th Cir. 1980). As the former Fifth Circuit observed, in determining whether the causes of action are the same, the substance of the actions, not the form, controls. White v. World Finance of Meridian, Inc., supra; Astron Industrial Associates, Inc. v. Chrysler Motors Corp., 405 F.2d 958, 961 (5th Cir. 1968); Acree v. Air Line Pilots Association, 390 F.2d 199, 201 (5th Cir.), cert. denied, 393 U.S. 852, 89 S.C t. 88, 21 L.Ed.2d 122 (1968).

[4] Applying these principles to the facts before us, we agree with the district judge that Ray's breach of contract claim is barred by res judicata. In each suit the primary right at issue was Ray's right of continued employment with the TVA, and in each suit Ray alleged that TVA interfered with that right by terminating his employment through a pretextual RIF. In substance, if not in form, the breach of contract alleged by Ray in this

suit is identical to his claims in the 1974 litigation and thus falls squarely within res judicata doctrine.

III. The Reemploymnet Rights Claim

[5,6] Count I of Ray's complaint also alleged that the TVA had violated Ray's reemployment rights under the Veteran's Preference Act. We find this claim barred for two reasons. First, Ray has admittedly known of the reemployment rights claim since his original complaint in 1974. In fact, Ray asserts as part of his malpractice claim against Drake that Drake failed to raise the reemployment rights issue in the 1974 lawsuit. As we noted above, application of res judicata requires the existence of four elements. Once a court determines that these elements exist, however, res judicata bars subsequent litigation "not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented." Jones v. Texas

Tech University, 656 F.2d 1137, 1141 (5th Cir. 1981) (quoting Stevenson, 516 F.2d at 108-09 (emphasis added)); Commercial Box & Lumber v. Uniroyal, Inc., 623 F.2d 371, 373 (5th Cir. 1980). After reviewing the record, we conclude that Ray's breach of contract claim and the alleged violation of his Veteran's Preference Act rights are substantially the same cause of action. We also find that substantially the same facts would be involved in support of each cause of action. See Stevenson, supra, 516 F.2d at 109. The claim under the Act, therefore, is an alternative theory of recovery for his termination from TVA, and Ray's failure to incorporate this theory into his earlier lawsuit bars the claim under res judicata principles.

[7] Second, even if Ray's claim was not subject to the bar of res judicata, it is untimely. Numerous Supreme Court and former Fifth Circuit precedents have reiterated the rule that when a federal statute granting a

cause of action fails to include a limitations period, a federal court should look to the state statute of limitations governing the state action most closely analogous to the federal action. E.g., United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60, 101 S.Ct. 1559, 1562, 67 L.Ed.2d 732 (1981); Board of Regents v. Tomanio, 446 U.S. 478, 483-84, 100 S.Ct. 1790, 1794-95, 64 L.Ed.2d 440 (1980); Johnson v. Railway Express, Inc., 421 U.S. 454 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975); Vigman v. Community National Bank & Trust Co., 635 F.2d 455, 459 (5th Cir. 1981); Ingram v. Steven Robert Corp. 547 F.2d 1260, 1261-62 (5th Cir. 1977). Of course, if the state limitations period is so short as to interfere with federal policies, it will not be applied to the federal action. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367, 97 S.Ct. 2447, 2454, 53 L.Ed.2d 402 (1977); Franklin v. City of Marks, 439 F.2d 665, 669 (5th Cir. 1971).

Here, Ray's claim that the TVA violated his rights under the Veteran's Preference Act is most analogous to state actions for "injury to the person or rights of another not arising from contract," which in Alabama are subject to a one-year limitations period. Ala.Code § 6-2-39(a)(5). See Rubin v. O'Koren, 621 F.2d 114, 116 (5th Cir. 1980), on rehearing 644 F.2d 1023 (5th Cir. 1981)(one year limitations period applies to civil rights actions under 42 U.S.C. § 1983); Sewell v. Grand Lodge of the International Association of Machinists and Aerospace Workers, 445 F.2d 545, 548-50 (5th Cir. 1971), cert denied, 404 U.S. 1024, 92 S.Ct. 674, 30 L.Ed.2d 674 (one-year period applies to suit under the federal labor laws for wrongful discharge); United Klans of America v. McGovern, 453 F.Supp. 836, 839-40 (N.D. Ala. 1978), aff'd, 621 F.2d 152 (5th Cir. 1980) (one-year period applies to claims by Ku Klux Klan that FBI officers violated its constitutional rights). Moreover, we conclude on the

basis of these precedents that the one-year limitations period of Alabama law is not so short as to frustrate federal policy. Cf. Franklin v. City of Marks, supra, 439 F.2d at 669 (court refused to adopt 10-day limitations period for a §1983 action). From the record in this case, the fact is undisputed that Ray knew of his reemployment rights claims in 1974. Hence even if Ray's claim was not prohibited by res judicata, the time for filing his claim lapsed in 1975 and is now barred by the applicable statute of limitations.

IV. The Slander Claim

[8] In count II of his complaint Ray alleged that he had been slandered by a TVA employee in October 1979 when the employee stated that the TVA had "fired Jim Ray" and that Ray had been the only management-level employee ever "fired" by the agency. The district court found that this claim did not state a federal cause of action under the authority of Paul v. Davis, 424 U.S. 693, 96

S.Ct. 1155, 47 L.Ed.2d 405 (1976). Ray, on the other hand, asserts that here the slander was in connection with a discharge from employment which Paul and other cases specifically recognized would be adequate to state a federal cause of action under the due process clause.[5]

Although we agree with the trial court that Ray's claim does not state a federal action, we do not find this issue as easy to resolve as did the trial court. In Paul, the plaintiff Davis' name and photograph had been included in a list of "active shoplifters" circulated by the police to local merchants. Although Davis had been charged with shoplifting approximately 18 months earlier, he

5. The essence of Ray's complaint was that the slander deprived him of liberty and property interests without due process of law. The cases discussed in this section of the opinion all deal with claims brought under the due process clause of the fourteenth amendment, which is applicable only to state action. Because Ray's claim is against a federal employee, it is grounded instead on the due process guaranty of the fifth amendment.

had not been brought to trial at the time of the distribution of the "active shoplifters" list, and the charges later were dropped. Davis sued the police chief under 42 U S C. § 1983, asserting that even though he had not lost his job, the list would impair future employment opportunities and interfere with his ability to shop in local businesses. The Supreme Court held that the injury to reputation alone was not actionable under § 1983, reasoning that federal law recognized an injury to reputation only when reputation was stigmatized in connection with a denial of "some more tangible interest, such as employment," or other constitutional rights. Paul, supra, 424 U.S. at 701, 710 n.5, 96 S.Ct. at 1160, 1165 n.5.[6]

6. The Court also noted that the due process guarantees would apply if a state sought to remove or significantly alter a state-created right. In Paul, however, the state of Missouri offered no protection of reputation beyond a tort action for vindicating his good name, hence the Court found no infringement of a protected right. Although Ray alleges that Alabama does specially protect reputa-

Subsequent to Paul, the Supreme Court in Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) made explicit what already was apparent from the structure of the Paul opinion: that injury to reputation in connection with an official discharge from employment was a cognizable federal claim. In Owen the Court stated:

> Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971), held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." In Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972), we explained that the dismissal of a government employee

tion in its criminal law, citing Ala.Code § 13A-11-160, that section pertains only to libel, not slander, and then only if the libel "tends to provoke a breach of the peace." Neither is Ala.Code § 13A-11-163 applicable to this case. That section pertains only to slander involving an accusation that the person slandered committed a felony or other crime involving "moral turpitude," which does not encompass the slander at issue here. Cf. Marrero v. City of Hialeah, 625 F.2d 499, 514-15 (5th Cir. 1980)(noting that Florida law does recognize a property interest in business goodwill).

> accompanied by a "charge against him that might seriously damage his standing and associations in his community" would qualify as something "the government is doing to him," so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name. In the present case, the city—through the unanimous resolution of the City Council—released to the public an allegedly false statement impugning petitioner's honesty and integrity. Petitioner was discharged the next day. The Council's accusations received extensive coverage in the press, and even if they did not in point of fact "cause" petitioner's discharge, the defamatory and stigmatizing charges certainly "occur[red] in the course of the termination of employment." Cf. Paul v. Davis, 424 U.S. 693, 710, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 405 (1976). Yet the city twice refused petitioner's request that he be given written specifications of the charges against him and an opportunity to clear his name. Under the circumstances, we have no doubt that the Court of Appeals correctly concluded that the city's actions deprived petitioner of liberty without due process of law.

Owen, supra, 445 U.S. at 633 n.13, 100 S.Ct. at 1406 n.13.

Shortly after Owen the former Fifth Circuit exhaustively reviewed Paul, its ancestors, and its progeny in a suit alleging that a local prosecutor had defamed the plaintiffs in connection with an illegal search and seiz-

ure. Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), cert. denied, 450 U.S. 913 101 S Ct. 1353, 67 L.Ed.2d 337 (1981). After analyzing the various precedents, the Marrero court concluded:

> [I]t is now apparent that the defamatory communication need not cause the loss of the protected right, or more tangible interest, in order to satisfy the stigma-plus requirement of Paul. Instead, it is sufficient that the defamation occur in connection with, and be reasonably related to, the alteration of the right or interest.

Marrero, supra, 625 F.2d at 519. The court, moreover, noted that each defamation case which permitted the action to go forward under federal law involved a situation in which the public would have perceived the defamation as connected to the deprivation of the "more tangible" right. Id.

Applying this test to the facts before us, we find that the defamation alleged by Ray did not "occur in connection with" the asserted deprivation of employment nor was it "reasonably related to" that deprivation.

This conclusion stems from the concurrence of two factors. First, the TVA employee who allegedly defamed Ray was a budget officer who had no connection whatsoever with the personnel decisions of the agency. It is unlikely, therefore, that the public would perceive the defamation as connected to the official termination of Ray by the appropriate authorities.[7]

Second, the alleged defamation occurred some six years after the TVA's RIF action against Ray. While we hesitate to set a temporal limit on the relationship between the alleged defamation and the other deprivation action, in this case we find that the long time lapse strengthens our conclusion that the

7. Of course, situations may arise in which a defamatory statement by a person other than those responsible for the government deprivation of the "more tangible" right (here, the termination of Ray's employment) nevertheless is sufficiently connected to the action to meet Paul's requirements. The defamer, for example, may be operating under the authority or with the approval of those who deprived the plaintiff of the "plus" right. The record here, however, fails to show any such connection.

alleged defamation was not connected to the employment termination. Given the conjunction of these two factors, we hold that the relationship between alleged defamation and alleged deprivation of employment was so attenuated that the defamation claim failed to state a federal cause of action under the principles of Paul v. Davis.

[9] Because Ray's defamation claim fails to state a federal cause of action, the claim can go forward only if it falls within the doctrine of pendent jurisdiction which permits a federal tribunal to hear state law claims not otherwise cognizable in federal court. Pendent jurisdiction encompasses two elements. First, for the federal court to have power to hear the state claims, the court "must have jurisdiction over a substantial federal claim and the federal and state claims must arise from a 'common nucleus of operative fact.'" Jackson v. Stinchcomb, 635 F.2d 462, 470 (5th Cir. 1981) (quoting United Mineworkers v.

Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Even when the power to hear the claim exists, the decision to exercise that power is discretionary with the trial judge. Gibbs, supra, 383 U.S. at 726, 86 S.Ct. at 1139; Jackson, supra, 635 F.2d at 470-71.

[10] Here, even assuming that the power existed for the trial court to hear the pendent claim, the court's refusal to exercise this jurisdiction was not an abuse of discretion. The only federal claims Ray asserted were the breach of contract and reemployment rights violations claims against the TVA which the trial court correctly decided in favor of the TVA on summary judgment. As the Supreme Court reasoned in Gibbs, "Certainly if the federal claims are dismissed before trial ... the state claims should be dismissed as well." Gibbs, supra, 383 U.S. at 726, 86 S.Ct. at 1139. See Tinker v. DeMaria Porsche-Audi, Inc., 632 F.2d 520, 523 (5th Cir. 1980) (trial court properly refused to exercise authority

to hear state law claims relating to automobile purchase once federal claims were dismissed); United States ex rel. Glynn v. Capeletti Brothers, Inc., 621 F.2d 1309, 1317-18 (5th Cir. 1980) (court properly declined to hear state claim after dismissing federal claim). Accordingly, we find no error in the trial court's refusal to entertain the slander claim.

V. The Malpractice Claim

[11] Count III of Ray's complaint alleged malpractice against Jack Drake, an attorney appointed by the district court to assist Ray in his original 1974 lawsuit.[8] Drake motioned the district court to dismiss the malpractice claim on the grounds that it failed to state a claim on which relief could be granted and that the court lacked subject-matter jurisdiction. The court granted this motion without opinion.

8. The court appointed Drake pursuant to 42 U.S.C. 2000e-5(f)(1).

We need not decide whether Ray's count III stated a proper claim for relief, because we conclude that the trial court lacked subject matter jurisdiction over the malpractice action. Because both Ray and Drake are citizens of the same state, Alabama, the court lacked diversity jurisdiction under 28 U.S.C. § 1332. Nor does the malpractice claim present a federal question. As this court recently observed:

> For a case to arise under federal law, a right or immunity created by that law must be an essential element of the plaintiff's claim; the federal right or immunity that forms the basis of the claim must be such that the claim will be supported if the federal law is given one construction or effect and defeated if it is given another. Maxwell v. First Nat'l Bank of Monroeville, 638 F.2d 32, 35 (5th Cir. 1981); In Re Carter 618 F 2d 1093, 1100 (5th Cir. 1980), citing Gully v. First Nat'l Bank of Meridian, 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936). In order to determine whether the claim arises under the Constitution or laws of the United States, we look to the complaint unaided by anticipated defenses and with due regard to the real nature of the claim. Maxwell, 638 F.2d at 35; Gully, 299 U.S. at 113, 57 S.Ct at 98.

Mobile Oil Corp. v. Coastal Petroleum Co.,

671 F.2d 419, 422 (11th Cir. 1982). Here, the "real nature" of Ray's claim against Drake is that Drake is guilty of malpractice under Alabama law. No federal right or immunity is involved in this claim and therefore federal question jurisdiction is lacking.[9] Finally, Ray's assertion that the malpractice claim falls under the pendent jurisdiction doctrine is incorrect. As we discussed above, a state law claim may proceed under pendent jurisdiction only if it and the federal claims presented arise from a "common nucleus of operative fact." The only federal claims presented in this case are Ray's claims against the TVA

9. Ray argues that Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed. 2d 488 (1980) and Woodburn v. Turley, 625 F.2d 589 (5th Cir. 1980) support his argument that federal jurisdiction exists over the malpractice claim. Neither case, however, has anything to do with jurisdiction. Roadway Express dealt with an award of attorney's fees incidental to a lawsuit which was based on federal question jurisdiction. Woodburn did involve a malpractice suit brought in federal court but the case fails to even mention jurisdiction and the consistent application of Texas law indicates that diversity jurisdiction was involved.

arising from the 1973 RIF. The malpractice claim, however, relates to the prosecution of the 1974 lawsuit against the TVA, not the 1973 RIF. The malpractice claim therefore is wholly separate from the federal claims both as to the facts necessary to prove the claim and the theory of recovery. Hence, we conclude that the malpractice claim and the federal claims did not arise from a "common nucleus of operative fact" and consequently the district court lacked the power to hear the malpractice claim. See, e.g., Wigand v. Flo-Tek, Inc., 609 F.2d 1028, 1033 (2d Cir. 1979)(where breach of contract claim lacked independent jurisdictional base and facts relating to that claim were separate from facts relating to federal securities law claim, court lacked power to hear claim under pendent jurisdiction); Hales v. Winn-Dixie Stores, Inc., 500 F.2d 836, 847-48 (4th Cir. 1974)(plaintiff's claim against employer for failure to make payments allegedly due under profit-sharing program and federal

claim that employer failed to provede certain information required by 29 U.S.C. §308(b) were "separately maintainable and determinable without any reference to the facts alleged or contentions stated in or with regard to the other count;" consequently, claims did not arise from a "common nucleus of operative fact."). Because no theory of jurisdiction supports the malpractice action, the trial court properly granted Drake's motion to dismiss.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

| | |
|---|---|
| JAMES D. RAY<br><br>Plaintiff,<br><br>v.<br><br>TENNESSEE VALLEY AUTHORITY, a Governmental Corporation; S. DAVID FREEMAN, Individually, and as Chairman of Board of Directors of Tennessee Valley Authority; RICHARD M. FREEMAN, Individually, and as Member of Board of Directors of Tennessee Valley Authority; ROBERT N. CLEMENT, Individually, and as Member of Board of Directors of Tennessee Valley Authority; ARNOLD E. BRIGLIA, Individually, and as Budget Officer of the Office of Agricultural and Chemical Development of the Tennessee Valley Authority,<br><br>Defendants. | CV80G1281NW<br><br>Filed Feb. 13, 1981<br><br>Entered Feb 17 1981 |

FINAL ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT

This cause came to be heard on Tennessee Valley Authority Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment, which the court chooses to handle as a motion for summary judgment. Having considered the

pleadings, affidavits submitted in regard thereto, and applicable law, this court is of the opinion that judgment is due the defendants as a matter of law, that there is no genuine issue of material fact and that there is no just reason for delay in issuing a final judgment. Accordingly, it is

ORDERED, ADJUDGED and DECREED that defendants' motion for summary judgment be and the same hereby is GRANTED and plaintiff's motion for partial summary judgment be and the same hereby is DENIED. Final judgment is hereby entered in favor of the defendants.

DONE and ORDERED this 13th day of February.

(s)
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

| | |
|---|---|
| JAMES D. RAY, | CV80G1281NW |
| Plaintiff, | FILED Feb 13 1981 |
| v. | |
| TENNESSEE VALLEY AUTHORITY, a Governmental Corporation; S. DAVID FREEMAN, Individually, and as Chairman of Board of Directors of Tennessee Valley Authority; RICHARD M. FREEMAN, Individually, and as Member of Board of Directors of Tennessee Valley Authority; ROBERT N. CLEMENT, Individually, and as Member of Board of Directors of Tennessee Valley Authority; ARNOLD E. BRIGLIA, Individually, and as Budget Officer of the Office of Agricultural and Chemical Development of the Tennessee Valley Authority, | ENTERED Feb 17 1981 |
| Defendants. | |

MEMORANDUM OPINION

This cause came to be heard on Tennessee Valley Authority Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment. The court chooses to handle this motion as a motion for summary judgment. Also before the court is plaintiff's motion for partial summary

judgment. It is the opinion of this court that defendants' motion for summary judgment is due to be granted and plaintiff's motion for partial summary judgment therefore is denied.

Counts one and two of plaintiff's complaint name the Tennessee Valley Authority (hereinafter T.V.A.) and members of T.V.A.'s Board of Directors in their individual and official capacities as defendants. Count one alleges that plaintiff's employment with T.V.A. was improperly terminated by a reduction in force (R.I.F.) in 1973 and, therefore, that defendants breached the employment contract he had with T.V.A. Count two alleges that defendant Arnold E. Briglia, a T.V.A. employee, slandered plaintiff in the course of Mr. Briglia's employment.

This is plaintiff's third attempt to litigate the issue presented in the first count. While the wording has been altered slightly, the substantive issue remains the same as

those previously litigated: that plaintiff's employment with T.V.A. was improperly terminated through a R.I.F. in 1973. In Acree v. Air Line Pilots Ass'n, 390 F.2d 199, 201 (5th Cir. 1968), the court found res judicata precluded a second suit holding:

> Thus the cause of action relied on in the [prior] litigation and the one here are identical. The remedy requested is also identical. True the identical words have not been used. . . . But essentially they are the same. What difference exists is in form, and we have long held that in determining res judicata it is the substance of the action that counts.

The situation in this case is quite similar to the one described above. Plaintiff first litigated the employment issue in 1974 in which the court granted summary judgment for defendants and against plaintiff on all counts. Ray v. Tennessee Valley Authority, No. 74-G-601-NW (N.D. Ala. Nov. 12, 1974), dismissed 521 F.2d 812 (5th Cir. 1975), cert. denied 424 U.S. 973 (1976). Plaintiff then attempted to intervene as a class member in the case of Eastland v. Freeman, No. 73-G-487-NW (N.D. Ala.

filed May 21, 1973) in which the court denied intervention. Plaintiff's appeal from this denial was recently dismissed by the Fifth Circuit. Ray v. Tennessee Valley Authority, No. 80-7553 (5th Cir. February 2, 1981). The present attempt (third) to relitigate the employment termination issue was commenced when plaintiff filed a complaint on September 30, 1980. Based simply on the concept of res judicata, plaintiff's present action must be barred.

Plaintiff's count one action is also barred by the one-year limitations provision of Section 6-2-39(a)(5), Code of Alabama 1975, as his claim is based on violation of his rights as a preference eligible veteran which arose under the federal Veterans' Preference Act. Prior decisions have established beyond question that interference with such claimed rights (based on federal or state statute) is subject to the one-year limitations period as "injury to the person or rights of another."

United Klans of America v. McGovern, 453 F. Supp. 836, 839-40 (N.D. Ala. 1978); Ripp v. Dobbs House, Inc., 366 F. Supp. 205 (N.D. Ala. 1973); Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108, 1117-8 (N.D. Ala. 1972), adopted and aff'd, 476 F.2d 1287 (5th Cir. 1973). As plaintiff's preference rights expired in March 1975, the one-year period has been exceeded and the action lost.

Turning now to the second count of plaintiff's action, plaintiff alleges that defendant Briglia slandered him in October 1979 by allegedly making a statement that T.V.A. "fired Jim Ray." Plaintiff is attempting to make a federal constitutional claim out of a state created tort action. In Paul v. Davis, 424 U.S. 693 (1976), the Supreme Court held that plaintiff's claim against a state official who allegedly defamed him did not violate plaintiff's constitutional property and liberty rights. Such a claim was a creature of the state's tort law and was not a federal claim.

Plaintiff's slander action in this case, as in Paul, is a state created claim. Since he does not have a constitutional claim, no subject matter jurisdiction exists and his slander action must be dismissed for lack of jurisdiction by this court.

For the reasons stated, it is the opinion of this court that judgment is due to be granted to defendants on counts one and two in this action.

A separate order in conformity herewith is being entered this date.

DONE this the 13th day of February 1981.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

| | |
|---|---|
| JAMES D. RAY, Plaintiff, vs. TENNESSEE VALLEY AUTHORITY, ET AL., Defendants. | ) CIVIL ACTION NO. 74-G-601-NW filed Nov 12,1974 |

ORDER

This cause came on to be heard on the defendants' motion to dismiss, or in the alternative for summary judgment. On June 20, 1974, plaintiff made a pro se filing of his complaint. On the same date, plaintiff applied to the court for the appointment of an attorney. Subsequently, the court appointed Mr. Jack Drake of the law firm of Drake, Knowles and Still, University, Alabama 35486, to represent the plaintiff in the above-styled case. On October 2, 1974, after interviewing the plaintiff and reviewing the plaintiff's complaint, etc., Mr. Drake moved this court to allow his withdrawal as counsel for the plaintiff. Mr. Drake stated

in his motion his professional belief that the plaintiff did not have a meritorious claim. This court granted Mr. Drake's motion to withdraw on October 8, 1974. At pretrial conference held in Florence, Alabama, on October 3, 1974, plaintiff again orally requested that this court appoint him counsel. This court arranged for Mr. U. W. Clemon of the law firm of Adams, Baker & Clemon, Birmingham, Alabama, 35203, to interview the plaintiff. Mr. Clemon is a recognized expert in the particular legal field involved in this litigation. Mr. Clemon interviewed the plaintiff and reviewed his complaint, etc.; and it is Mr. Clemon's professional opinion that the plaintiff does not have a meritorious claim. Therefore, this court determines that it should not appoint counsel for the plaintiff. Further, this court, after considering the defendants' motion for summary judgment, determines and is of the opinion that said motion is due to be granted; there is no genuine issue as to any material

fact; and the defendants are entitled to judgment as a matter of law.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the plaintiff's motion for the appointment of counsel be, and the same is, denied. It is FURTHER ORDERED, ADJUDGED and DECREED that defendants' motion for summary judgment be, and the same hereby is, granted, with the above-styled case being dismissed.

DONE this 12th day of November, 1974.

J. FOY GUIN, JR.
UNITED STATES DISTRICT JUDGE

(There is no final order on a separate document)

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW

BAR:db
May 21, 1974

Mr. Robert L. Potts
Potts and Young
Attorneys
107 East College Street
Florence, Alabama 35630

Dear Mr. Potts:

This is in further reference to your appeal in behalf of Mr. James D. Ray from a decision of the Commission's Atlanta Regional Office dated January 18, 1974 sustaining the Tennessee Valley Authority, Division of Chemical Research, Muscle Shoals, Alabama, which by application of reduction-in-force procedures separated Mr. Ray from his position of Research Chemist (Nuclear Magnetic Resonance Studies), M-6, effective March 30, 1973.

The Board has thoroughly reviewed the entire appellate record developed and relied upon by the Atlanta Regional Office to determine whether, in light of the representations to the Board, the Region was correct in concluding that the reduction-in-force action by which appellant was affected, was accomplished in compliance with applicable regulations and instructions.

In effecting a reduction-in-force action, an agency subject to the requirements of part 351 of the Civil Service regulations is obliged to comply with those requirements. It is the responsibility of the Civil Service Commission, pursuant to its appellate authority, to review appeals from reduction-in-force actions to determine whether the appellant was properly within reach for release from the position to

which he was officially assigned at the time of the reduction-in-force action, whether the notice of reduction-in-force action was timely and otherwise in accord with the notice requirements in the regulations, and if the appellant was so entitled, he received a reasonable offer of assignment. The facts in appellant's case have been evaluated in the light of those requirements.

The Board concurs in the findings of the Region that the agency complied with the procedural requirements of the Civil Service regulations. The Board has reviewed the evidence of record with respect to appellant's allegation that his separation was motivated on account of his religion. While there appears to be some indication that appellant experienced some problems with relative to his interpersonal relationship with his supervisor, the Board finds no evidence that would establish these problems led to the inclusion of appellant's position in the reduction in force. Accordingly, the Board finds, as did the Region, no evidence to substantiate the claim that appellant's vulnerability to reduction-in-force action was prompted by his religion.

As appellant's representative, in your letter to the Board of February 4, 1974, you have asked for an adversary-type hearing at some point for appellant. When discrimination is alleged in connection with an otherwise appealable action, the correct first level procedure is to request that the agency conduct an investigation in accordance with part 713 of the Civil Service regulations, and forward that investigation to the Commission's first-level office for consideration in connection with the other action under appeal. Under the circumstances of his case, appellant is not entitled to an adversary-type hearing. The Board finds that the procedures followed by the Atlanta Regional Office are in accord with the

Commission's regulations and instructions for processing an appeal which includes an allegation of discrimination based on religion.

An examination of the pertinent documents of record reveals that the Regional Office was correct in its findings on all the other relevant aspects of the reduction-in-force action effected in this appellant's case.

Accordingly, the Board of Appeals and Review, finding no violation of appellant's reduction-in-force rights, hereby affirms the decision of the Atlanta Regional Office.

Section 772.307(c) of the Civil Service regulations provides that decision of the Board are final and that there is no further right of administrative appeal.

For the Commissioners:

Sincerely yours,

(s)
William P. Berzak
Chairman

5 U.S.C. § 1302(c)

The Commission shall prescribe regulations for the administration of the provisions of this title that implement the Congressional policy that preference shall be given to preference eligibles in certification for appointment, and in appointment, reinstatement, reemployment, and retention, in the excepted service in Executive agencies, permanent or temporary, and in the government of the District of Columbia.

Ch. 171 TORT CLAIMS PROCEDURE

5 U.S.C. § 2680 Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(1) Any claim arising from the activities of the Tennessee Valley Authority.

5 U.S.C. § 7512. Cause; procedure; exception

(a) An agency may take adverse action against a preference eligible employee, or debar him for future appointment, only for such cause as will promote the efficiency of the service.

(b) A preference eligible employee against whom adverse action is proposed is entitled to--

(1) at least 30 days' advance written notice, except when there is reasonable cause to believe him guilty of a crime for which a sentence of imprisonment can be imposed, stating any and all reasons, specifically and in detail, for the proposed action;

(2) a reasonable time for answering the notice personally and in writing and for furnishing affidavits in support of the answer; and

(3) a notice of an adverse decision.

(c) This section does not apply to the

suspension or removal of a preference eligible employee under section 7532 of this title.

16 U.S.C. § 831c. The Tennessee Valley Authority Act of 1933.

Except as otherwise specifically provided in this chapter, the Corporation--

* * *

(b) May sue and be sued in its corporate name. (emphasis supplied)

16 U.S.C. § 831x. Condemnation proceedings; institution by Corporation; venue

The Corporation may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements, or rights-of-way which, in the opinion of the Corporation, are necessary to carry out the provisions of this chapter. The proceedings shall be instituted in the United States district court for the district in which the land, easement, right-of-way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America. (emphasis supplied)

42 U.S.C. § 2000e-5(f)(1) * * * Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security.

42U.S.C. § 2000e-11 Veterans' special rights or preference.

Nothing contained in this subchapter shall

be construed to repeal or modify any Federal, State, Territorial, or local law creating special rights or preference for veterans.

REGULATIONS

The regulations of the Civil Service Commission, which are applicable here because of the grandfather clause of the Civil Service Reform Act of 1978 are in relevant part:

5 C.F.R. § 330.202

An employee or former employee who thinks his reemployment priority rights under this subpart have been violated may appeal in writing to the Commission by presenting factual information that he was improperly denied reemployment because of the employment of another person.

5 C.F.R. § 330.203

Although there is no specific time limit on the filing of a reemployment priority list appeal, an employee shall exercise due diligence in appealing under § 330.202

Federal Personnel Manual
Chapter 351. Reduction in Force
Appendix D. Content of Appeal and Basis for Appeal

D-2 WHAT MAY BE APPEALED

a. Appelas may be based on grounds such as the following;

(1) Retention of an employee in a lower subgroup in a job for which appellant considers himself qualified.

(2) Insufficient notice.

(3) Inadequate reasons, or failure to give reasons, for exceptions to the regulations.

(4) Denial of right to examine the regulations or to inspect the retention registers

and related records.

(5) Excessive narrowness of competitive area.

(6) Excessive restriction of competitive level.

(7) Improper tenure grouping.

(8) Violation of veteran preference rights.

(9) Error in establishing service date.

(10) Failure to make reasonable offer of change of position.

(11) Improper determination of physical unfitness for position change.

(12) Improper placement on leave without pay during notice period.

(13) Agency failure to comply with its own administrative provisions on reduction in force.

## STATE OF ALABAMA CONSTITUTION AND LAWS

Alabama Constitution of 1901, Art. 1, Sec. 13. Courts to be open; remedies for all injuries; impartiality of justice.

That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay. (emphasis supplied)

Code of Alabama, 1975
§ 6-2-34 Commencement of actions- six years

(4) actions founded on promises in writing not under seal;

(8) Motions and other actions against attorneys-at-law for failure to pay over money of their clients or for neglect or ommission of duty; and

(9)

Code of Alabama, 1975
§ 6-5-180 Import of accusations of false

swearing or commission of crime.

Every accusation of false swearing presumptively imports a charge of perjury, and every accusation importing the commission of a crime punishable by indictment must be held presumptively to mean what the language used ordinarily imports.

Code of Alabama, 1975

§ 6-5-182 Libel or slander--Burden of Proof.

In an action for libel or slander, the plaintiff must prove, unless it shall be admitted by the defendant, the facts showing that the alleged defamatory matter was published or spoken of the plaintiff.

Code of Alabama, 1975

§ 6-5-183. Same-Mitigation of damages - Evidence of truth or circumstances

In all actions of slander or libel, the truth of the words spoken or written or the circumstances under which they were spoken or written may be given in evidence under a general denial in mitigation of the damages.

Code of Alabama, 1975

§ 8-10-3 Restraining trade or production, monopolizing commodities or business, destruction of competition, etc.

Any person or corporation, domestic or foreign, which shall restrain, or attempt to restrain, the freedom of trade or production, or which shall monopolize, or attempt to monopolize, the production, control or sale of any commodity or the prosecution, management or control of any kind, class or description of business or which shall destroy, or attempt to destroy, competition in the manufacture or sale of a commodity shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than $500.00 nor more than $200.00

for each offense.

State of Alabama Acts of 1981, No. 81-355, p. 510, § 5:
Code of Alabama § 8-19-5 Unlawful Trade Practices.

The following deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful

* * *

(8) Disparaging the goods, services or business of another by false or misleading representation of fact;

Code of Alabama, 1975
§ 8-19-6 Interpretation.

It is the intent of the legislature that in construing section 8-19-5, due consideration and great weight shall be given where applicable to interpretations of the federal trade commission and the federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1), as from time to time amended (Acts 1981, No. 81-355, p. 510, § 6.)

Code of Alabama, 1975
§ 13A-11-163 Defamation.

Any person who writes, prints or speaks of and concerning any woman, falsely imputing to her a want of chastity; and any person who speaks, writes or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony or any other indictable offense involving moral turpitude shall, on conviction, be punished by fine not exceeding $500.00 and imprisonment in the county jail, or sentenced to hard labor for the county, not exceeding six months, one or both, at the discretion of the jury. (emphasis supplied to relevant matter)

Code of Alabama, 1975

§ 25-7-9 Interference, etc., with peaceable exercise of lawful industry, business, etc.

Any person who, by force or threats of violence to person or property, or who, by any means of duress prevents, or seeks to prevent, another from doing work or furnishing materials or from contracting to do work or furnish materials for or to any person engaged in any lawful business, or who disturbs, interferes with or prevents, or in any manner attempts to prevent the peaceable exercise of any lawful industry, business or calling by any other person shall, on conviction, be fined not less than $10.00 nor more than $500.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than 12 months. (emphasis supplied)

Office - Supreme Court, U.S.
FILED
DEC 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-842

# In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES D. RAY, PETITIONER

*v.*

TENNESSEE VALLEY AUTHORITY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE TENNESSEE VALLEY AUTHORITY, ITS BOARD OF DIRECTORS, AND ARNOLD E. BRIGLIA IN OPPOSITION

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
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HERBERT S. SANGER, JR.
*General Counsel*
*Tennessee Valley Authority*
*Knoxville, Tennessee 37902*

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*Assistant General Counsel*

THOMAS F. FINE
*Attorney*
*Tennessee Valley Authority*
*Knoxville, Tennessee 37902*

## QUESTIONS PRESENTED

1. Whether the courts below correctly held that petitioner's attempt to relitigate his 1973 termination of employment with the Tennessee Valley Authority was barred by the doctrine of res judicata.

2. Whether the courts below correctly held that petitioner's claim that he had been defamed by a TVA employee's remark in 1979, unconnected with an employment decision concerning petitioner, did not state a federal cause of action and did not call for the exercise of pendent federal jurisdiction.

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# In the Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-842

JAMES D. RAY, PETITIONER

*v.*

TENNESSEE VALLEY AUTHORITY, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

---

## BRIEF FOR THE TENNESSEE VALLEY AUTHORITY, ITS BOARD OF DIRECTORS, AND ARNOLD E. BRIGLIA IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals on the merits (Pet. App. A1-A31) is reported at 677 F.2d 818. The order denying rehearing en banc is reported at 683 F.2d 1375. The opinion and order of the district court (Pet. App. A32-A39) are not officially reported.

### JURISDICTION

The judgment of the court of appeals was entered on June 4, 1982, and a petition for rehearing and suggestion for rehearing en banc was denied on August 3, 1982. The petition for certiorari was filed on November 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This pro se petition for certiorari arises out of petitioner's third attempt[1] to litigate his termination in 1973, through a reduction in force (RIF), from his position as a research chemist with the Tennessee Valley Authority (TVA) at Muscle Shoals, Alabama.[2]

Petitioner appealed his termination to the former United States Civil Service Commission. In 1974, after the Commission's Board of Appeals and Review denied petitioner's appeal (Pet. App. A43-A45), petitioner filed an action in district court against the TVA, its Board of Directors, and several TVA officials claiming that his RIF termination was a sham and that he improperly had been terminated by the TVA (*id.* at A9). Summary judgment was granted for defendants on November 12, 1974 (*id.* at A40-A42), and the former Fifth Circuit dismissed petitioner's appeal as untimely.[3] See *Ray* v. *Tennessee Valley Authority*, 521 F.2d 812 (1975), cert. denied, 424 U.S. 973 (1976).

Petitioner attacked his RIF for a second time in 1980 when he attempted to intervene as a class mem-

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[1] Since his unsuccessful appeal of the district court's decision in this case, petitioner has instituted a fourth lawsuit against the board of directors of the TVA and the Equal Employment Opportunity Commission concerning his termination of employment. See *Ray* v. *Dean*, CD82-HM-5239-NW (N.D. Ala.)

[2] TVA is a federal corporation whose employees are in the "excepted" rather than the "competitive" service. 16 U.S.C. 831b; 5 U.S.C. (Supp. V) 2102(a)(1)(A); 5 U.S.C. (& Supp. V) 2103.

[3] However, the Fifth Circuit also stated that it had reviewed the merits of the district court's decision and found no error (See Pet. App. A9 n.2).

ber in *Eastland* v. *Freeman*, No. 73-G-487-NW (N.D. Ala.), a class action racial discrimination suit. The district court denied petitioner's motion to intervene (27 Empl. Prac. Dec. (CCH) ¶ 32,143 (N.D. Ala. 1980)), and the Fifth Circuit dismissed petitioner's appeal (*Eastland* v. *Tennessee Valley Authority*, 638 F.2d 1232 (1981)) and denied rehearing en banc (641 F.2d 879 (1981)).

In 1980, petitioner brought the present action against the TVA and its Board of Directors, claiming that the TVA's RIF violated his "employment contract" with the TVA and his "reemployment rights" under the Veterans' Preference Act of 1944. Petitioner also claimed that Arnold E. Briglia, a TVA budget officer, defamed him in October 1979 by stating that petitioner had been "fired" in 1973.

The district court entered summary judgment against petitioner. Finding that "the substantive issue remains the same as those previously litigated" in petitioner's 1974 action and petitioner's unsuccessful attempt to intervene in the class action against the TVA (Pet. App. A35-A36), the district court held that petitioner's breach of contract claim was barred by the doctrine of res judicata (*id.* at A37). The district court also held that petitioner's Veterans' Preference Act claim was barred by the applicable one-year statute of limitations (*id.* at A37-A38).[4] The district court dismissed petitioner's defamation claim on the ground that it was a state law claim over which

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[4] Finding that federal law did not provide a statute of limitations for Veterans' Preference Act claims, the district court applied the one-year limitations period prescribed by Ala. Code § 6-2-39(a)(5) (1975), which governs actions arising from an " 'injury to the person or rights of another' " (Pet. App. A37-A38).

the court had no subject matter jurisdiction (*id.* at A38-A39).

The court of appeals affirmed. Finding that a final judgment had been rendered against petitioner in his 1974 action against the TVA (Pet. App. A12), the court of appeals concluded that petitioner's claim in this action was barred by res judicata (*id.* at A13-A14):

> In each suit the primary right at issue was Ray's right of continued employment with the TVA, and in each suit Ray alleged that TVA interfered with that right by terminating his employment through a pretextual RIF. In substance, if not in form, the breach of contract alleged by Ray in this suit is identical to his claims in the 1974 litigation and thus falls squarely within res judicata doctrine.

The court of appeals similarly found petitioner's Veterans' Preference Act claim barred by res judicata, since it involved "substantially the same cause of action" (*id.* at A15). Alternatively, the court of appeals found petitioner's Veterans' Preference Act claim barred by the one year limitations period that Alabama law imposed upon analogous state law claims (*id.* at A17; see note 4, *supra*).

Although it found the issue more difficult to resolve than the district court had (Pet. App. A19), the court of appeals affirmed the district court's dismissal of petitioner's defamation claim. Following *Paul* v. *Davis*, 424 U.S. 693 (1976), and *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (Pet. App. A18-A23), the court of appeals concluded that petitioner could state a federal cause of action if the defamation " 'occur[red] in connection with' " his termination of employment and was " 'reasonably related' " to the termination (*id.* at A23, quoting *Marrero* v. *City of*

*Hialeah*, 625 F.2d 499, 519 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981)). However, the court of appeals found that petitioner's defamation claim met neither requirement, since "the TVA employee who allegedly defamed Ray was a budget officer who had no connection whatsoever with the personnel decisions of the agency" (*id.* at A24) and "the alleged defamation occurred some six years after the TVA's RIF action against Ray" (*ibid.*). Concluding that petitioner stated no federal cause of action, the court of appeals held that the district court had not abused its discretion in refusing to exercise pendent federal jurisdiction over petitioner's state law defamation claim (*id.* at A26).[5]

## ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals and does not warrant further review.

A. Petitioner contends (Pet. 17-19) that the courts below erred in dismissing his complaint because they found that his 1974 action was based upon the Equal Employment Opportunity Act, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, while the present case alleges a breach of contract. Petitioner's arguments, however, misstate the facts. The district court found that petitioner's 1974 action raised the identical issue present in the present case: whether petitioner's "employment with T.V.A. was improperly terminated through a R.I.F. in 1973" (Pet. App. A36). The court of appeals likewise found that "[i]n each suit the primary right at issue was Ray's right of con-

[5] The court of appeals also affirmed the district court's dismissal of petitioner's malpractice claim against respondent Jack Drake on the ground that there was no diversity of citizenship (Pet. App. A28).

tinued employment with the TVA, and in each suit Ray alleged that TVA interfered with that right by terminating his employment through a pretextual RIF" (*id.* at A13). Moreover, even if petitioner were stating a genuinely different claim in the present case, the claim would properly be barred by res judicata, since the doctrine bars a party from relitigating issues that could have been raised in the prior action (*Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981)), and both the 1974 action and the present case are based upon petitioner's termination from TVA employment in 1973.[6]

B. Petitioner's argument that the courts below improperly applied the Alabama one-year tort limitations period to his claim under the Veterans' Preference Act of 1944, is likewise without substance. Since the Veterans' Preference Act contains no statute of limitations, the district court and the court of appeals correctly referred to Alabama law in selecting a limitations period. See *United Parcel Service* v. *Mitchell*, 451 U.S. 56, 60 (1981); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975). The relevant provision of Alabama law, governing "injury to the * * * rights of another not arising from contract" (Ala. Code § 6-2-39(a)(5) (1975)),

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[6] Petitioner argues (Pet. 19) that the dismissal of his 1974 action should not have been given res judicata effect because the district court proceedings in the 1974 case involved only a review of the administrative record of petitioner's appeal to the Civil Service Commission. The district court's order dismissing the 1974 complaint (Pet. App. A40) gives no indication of the scope of the court's review. However, the courts below—which had before them petitioner's 1974 complaint (*id.* at A15, A35-36)—did not find petitioner's 1974 action so narrowly defined. Moreover, in his subsequent petition for certiorari (No. 75-6017, 1975 Term) in that case, petitioner raised the same issues as those in the present case.

properly applies to petitioner's Veterans' Preference Act claim, which seeks to vindicate a statutory right. Although petitioner has attempted to cast his Veterans' Preference Act claim as contractual to avoid the one-year limitations period (Pet. 22-23), it is clear from the face of the statute that the right petitioner seeks to enforce does not arise from his employment contract with the TVA. See 5 U.S.C. (Supp. V) 3315(a).[7]

Petitioner's suggestion (Pet. 24) that his pursuit of his appeals before the Equal Employment Opportunity Commission should toll the limitations period governing his Veterans' Preference Act claim also is without merit. In *Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 U.S. at 460-461, the Court held that the filing of employment discrimination charges with the EEOC should not operate to toll the limitations period for a parallel racial discrimination action brought under 42 U.S.C. 1981. As in *Johnson*, it is clear here that petitioner's EEOC charges and his Veterans' Preference Act claim are at best "independent administrative and judicial remedies." 421 U.S. at 461. Petitioner has cited no authority supporting his apparent contention that Congress considered the Equal Employment Opportunity Act and the Veterans' Preference Act so closely related that the filing of administrative charges with

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[7] Petitioner also attempts (Pet. 23-24) to characterize this action as one seeking contractual damages under the Back Pay Act, 5 U.S.C. (& Supp. V) 5596. Leaving to one side the question of the applicability of the Back Pay Act to this case, however, it is clear that the Act has no relevance here, where the termination of petitioner's employment with the TVA has not been found to be an "unjustified or unwarranted personnel action." 5 U.S.C. 5596(b).

the EEOC should toll the limitations period for petitioner's claim under the latter statute. See *Johnson*, *supra*, 421 U.S. at 461.

C. Finally, there is no merit to petitioner's argument (Pet. 15-16) that the courts below held that the TVA could not be sued for a tort arising under state law. Contrary to petitioner's assertions, neither the district court nor the court of appeals held that the TVA was not amenable to a state law tort claim or passed upon the merits of petitioner's state law claim. Rather, both courts held that petitioner had not stated a valid defamation claim under federal law (Pet. App. A19, A38-39). The district court did no more than refuse to exercise pendent federal jurisdiction over the claim. The court of appeals was correct in finding that this was a proper exercise of discretion, since petitioner had no substantial federal defamation claim and petitioner's state law defamation claim shared no common factual basis with the remaining counts of petitioner's suit. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 722, 728 (1966).[8]

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[8] Petitioner also has raised other issues in his petition that were not presented to the district court or the court of appeals. The Court need not reach these issues absent special circumstances which are not present here. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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